in the

Supreme Court

of the

United States

OCTOBER TERM 1979

Case No. 79-139

MARTIN BLITSTEIN,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent,

In The Matter of MARTIN BLITSTEIN,
Relator,

BRIEF IN OPPOSITION TO ALTERNATIVE PETITION FOR WRIT OF CERTIORARI OR PROHIBITION TO THE SUPREME COURT OF FLORIDA

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OPINION BELOW

The opinion of the Supreme Court of Florida in *The Florida Bar v. Blitstein*, No. 55,984 (Fla. Feb. 23, 1979), is printed in Appendix A of Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida, and is also set forth in Appendix IV of this brief.

JURISDICTION

The Florida Bar respectfully submits that this Court does not have jurisdiction to review the suspension order of the Supreme Court of Florida on writ of certiorari. Rule 23.1(f) of the Rules of the Supreme Court of the United States requires that a petition for writ of certiorari set forth the manner in which the federal questions sought to be reviewed were raised in the court below, the method of raising them, and the way in which they were passed upon by the court. The obvious purpose served by these requirements is to show that the federal questions were timely and properly raised so as to give this Court jurisdiction.

Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida is devoid of any statement regarding the manner in which the due process and equal protection questions sought to be reviewed were raised in the court below, the method of raising those questions, and the way in which the questions were passed upon by the court. Accordingly, Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court

of Florida should be dismissed for failure to comply with Rule 23.1(f) of this court. *See Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 25, 67 L.Ed. 194 (1922).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision relevant to the issues in this case is the Fourteenth Amendment to the United States Constitution. The state statute under consideration is Rule 11.07 of article XI of the Integration Rule of The Florida Bar. The above amendment and statute are set forth in relevant part in Appendix I of this brief.

QUESTIONS PRESENTED

I.

Whether due process requires a *de novo* hearing as to the facts underlying an attorney's felony conviction prior to the attorney's summary suspension from the practice of law on the basis of that conviction.

II.

Whether by failing to raise the question in the court below, Mr. Blitstein waived his right to assert that the summary suspension provision of The Florida Bar Integration Rule denied him equal protection of the law.

STATEMENT OF FACTS

The respondent, The Florida Bar, accepts the Statement of Facts as set forth in Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida at 3-4, but submits in addition thereto the following facts:

On January 22, 1979, Mr. Blitstein filed a Petition to Withhold Suspension in the Supreme Court of Florida pursuant to Rule 11.07(3) of the Integration Rule of The Florida Bar. Appendix II, p. App. 4 *infra*. In his Petition to Withhold Suspension, Mr. Blitstein asserted, *inter alia*: (1) that he was unjustly convicted (App. 11-12); (2) that good cause for a reversal of his conviction may exist (App. 13-18); (3) that failure to withhold the suspension would have severe adverse effects on both his family and his professional reputation (App. 18-19); (4) that his prior professional and social reputation was one of high esteem and respect (App. 19-23); and (5) that Rule 11.07(3) of the Integration Rule of The Florida Bar is unconstitutional in that it operates as a denial of procedural due process (App. 23-29). In short, Mr. Blitstein availed himself fully of the opportunity provided by Rule 11.07(3) of the Integration Rule to show good cause why the Florida Supreme Court should have withheld his suspension. Mr. Blitstein was suspended only after judicial review of the mitigating factors presented to the Florida Supreme Court by Mr. Blitstein.

Mr. Blitstein further asserted in his Petition to Withhold Suspension that "he is not of such callous and insensitive nature as to be a bad risk during the

pendency of his appeal; neither would he be likely to victimize his clients . . . . " (App. 23). Not only was Mr. Blitstein convicted of victimizing a client in the case *sub judice*, but he has previously been suspended from the practice of law in Florida for, *inter alia*, misappropriation of a client's funds. Appendix III, p. App. 33 *infra*.

SUMMARY OF ARGUMENT

I.

In defining the parameters of procedural due process, this Court has established that an evidentiary hearing is not required in all cases prior to governmental action which adversely affects private interests. In order to determine whether a prior evidentiary hearing is required in a particular case, three factors are taken into consideration: (1) the private interest affected, (2) the fairness and reliability of existing procedures, and the probable effectiveness of additional or substitute procedures, and (3) the government's interest furthered by the existing procedures. Therefore, the constitutionality *vel non* of Rule 11.07(3) of The Florida Bar Integration Rule, which provides for the summary suspension of an attorney convicted of a felony without an evidentiary hearing as to the facts underlying the attorney's conviction, must be determined with regard to the three factors enumerated above:

(a) The first factor is Mr. Blitstein's interest in continuing to practice law during the pendency of his appeal. Since the duration of his suspension is controlled in part by the vigor with which he prosecutes his appeal, and since Mr. Blitstein has alternative

sources of income available to him during his suspension, his interest in continuing to practice law during the pendency of his appeal is not compelling.

(b) The existing Florida procedure, which deems a conviction to be conclusive proof of guilt, does nothing more than assume that the criminal standard of proof has been applied fairly and reliably. Since the criminal standard of proof is higher than the standard utilized in Bar disciplinary proceedings, and since any other procedure would force the Florida Supreme Court into the position of attempting to predict the likely outcome of the convicted attorney's appeal, any additional or substitute procedure would be undesirable.

(c) The third factor is the interest of The Florida Bar which is furthered by the existing procedures. The summary suspension procedures are designed to prevent the convicted attorney from victimizing his clients during the pendency of his appeal, and to maintain the public confidence in the integrity of the Bar. No additional or substitute procedure would adequately serve those ends.

(d) On balance the interest of The Florida Bar fostered by the existing procedures clearly outweigh the interest of Mr. Blitstein.

(e) Since the summary suspension procedure of The Florida Bar comports with the due process requirements established by the decisions of this Court, there is no clear basis for invoking the certiorari jurisdiction of this Court. Therefore, Mr. Blitstein's Petition for Writ of Certiorari should be denied.

II.

Mr. Blitstein failed to comply with the rule of this Court which requires that a petition for writ of certiorari show that all federal questions relied upon as a basis for certiorari jurisdiction were raised in a proper and timely manner in the state court.

(a) Not only is Mr. Blitstein's Petition for Writ of Certiorari devoid of any such showing as to the procedural due process question (which was raised in the state court), but it is also devoid of any such showing as to the equal protection question (which is not surprising since Mr. Blitstein raised that question for the first time in his Petition for Writ of Certiorari).

(b) Mr. Blitstein has waived his right to raise the equal protection question before this Court.

ARGUMENT

I.

DUE PROCESS DOES NOT REQUIRE A *DE NOVO* HEARING AS TO THE FACTS UNDERLYING AN ATTORNEY'S FELONY CONVICTION PRIOR TO THE ATTORNEY'S SUMMARY SUSPENSION FROM THE PRACTICE OF LAW ON THE BASIS OF THAT CONVICTION.

It is not the position of The Florida Bar that a license to practice law can be suspended without compliance with the procedural due process constraints

imposed by the Due Process Clause of the Fourteenth Amendment. A license to practice law has been categorized as a type of "new property" interest within the meaning of the Due Process Clause, Reich, *The New Property*, 73 Yale L.J. 733 (1964), and an attorney may not be deprived of that property interest without being afforded procedural due process. *In re Ruffalo*, 390 U.S. 544, 550, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972); *In re Echeles*, 430 F.2d 347, 352 (7th Cir. 1970). Accordingly, the disputed issue in the instant case is not whether any process is due, but, rather, what process is due prior to suspending an attorney who has been convicted of a felony but who has not yet received an appellate-level determination regarding the validity of his conviction.

Mr. Blitstein takes the position that due process requires the Supreme Court of Florida to either conduct an evidentiary hearing to inquire into the facts underlying an attorney's felony conviction or await the exhaustion of all available appellate remedies prior to suspending an attorney pursuant to Rule 11.07(3) of article XI of The Florida Bar Integration Rule, 32 Fla. Stat. Ann. 147 (Supp. 1978). Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida *passim*. Such an assertion is supported by neither the decisions of this Court nor by logic, therefore, Mr. Blitstein's Petition should be denied.

If a single rationalizing principle can be gleaned from the prior decisions of this Court dealing with procedural due process it is undoubtedly that due process is an amorphous concept that has no particular meaning apart from the time, place and circumstances

of the case in which the concept is being applied. *E.g.*, *Matthews v. Eldridge*, 424 U.S. 319, 333-35, 96 S.Ct. 893, 902-03, 47 L.Ed 2d 18 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972); *Fuentes v. Shevin*, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 2002-03, 32 L.Ed.2d 556 (1972); *Bell v. Burson*, 402 U.S. 535, 540, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 266-71, 90 S.Ct. 1011, 1019-22, 25 L.Ed.2d 287 (1970); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). And although some kind of hearing is required before an individual may be *finally* deprived of a property interest, *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 94 S.Ct. 2963, 2975-76, 41 L.Ed.2d 935 (1974), due process does not require an evidentiary hearing in every case *prior* to the deprivation of an individual's property interest. *Matthews v. Eldridge*, 424 U.S. at 333, 96 S.Ct. at 902. *See* Friendly, *Some Kind of Hearing*. 123 U.Pa.L.Rev. 1267 (1974-75).

In *Eldridge* this court was faced with the question regarding whether due process required an evidentiary hearing prior to the termination of an individual's social security disability benefits. There the state agency charged with monitoring the medical condition of disability benefit recipients made a tentative determination that Eldridge's disability has ceased, and notified Eldridge that it intended to recommend to the Social Security Administration that his benefits be terminated. Eldridge was given an opportunity to respond to the state agency's reasons for the proposed termination of benefits and to submit additional information pertaining to his condition. Eldridge submitted a written response in which he disputed one

of the state agency's characterizations of his medical condition, but he did not submit any additional information pertaining to his condition. The state agency thereafter made its final determination that Eldridge had ceased to be disabled and submitted its recommendation for termination of benefits to the Social Security Administration, which terminated Eldridge's benefits.

In holding that this procedure did not violate due process, this Court announced something akin to a general formula for determining what process is due in any given case:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 334-35, 96 S.Ct. at 903 (citation omitted).

The application of the *Eldridge* due process balancing formula in the instant case inevitably results in the refutation of Mr. Blitstein's due process challenge to Rule 11.07(3) of The Florida Bar Integration Rule, 32 Fla. Stat. Ann. 148 (Supp. 1978). However, before an

application of the *Eldridge* formula can be made, the suspension procedures embodied in Rule 11.07 in general, and Rule 11.07(3) in particular, must first be described. *See* Appendix I *infra*.

Rule 11.07 of The Florida Bar Integration Rule, 32 Fla. Stat. Ann. 147 (Supp. 1978), deals with the subject of discipline when a lawyer is convicted of a felony. Rule 11.07(4) provides the procedure for disciplinary action when a judgment of guilt of a felony committed by a lawyer becomes *final* without appeal or by affirmance on appeal. The cited Rule provides that once the judgment of guilt becomes final the suspension imposed on the conviction pursuant to rule 11.07(2) or (3) will remain in effect until the lawyer is reinstated pursuant to a petition for reinstatement filed by the suspended lawyer or upon termination of disciplinary proceedings by The Florida Bar. Rule 11.07(4) further provides that The Florida Bar may at any time after final conviction initiate an independent disciplinary action against the convicted attorney. The reason for the latter provision is that although the judgment of conviction is deemed to be conclusive proof of guilt of the offense charges, this is a rule of evidence and not in and of itself conclusive on the ultimate disciplinary action to be taken. *The Florida Bar v. Fussell*, 179 So.2d 852, 854 (Fla. 1965). In both reinstatement proceedings and independent disciplinary proceedings the convicted attorney is afforded notice and a hearing. Fla. Bar Integr. Rule, art. XI, Rule 11.11, 32 Fla. Stat. Ann. 157 (Supp. 1978)(reinstatement proceedings) and, Fla. Bar Integr. Rule, art. XI, Rule 11.04, 32 Fla. Stat. Ann. 139 (Supp. 1978)(grievance committee proceedings), respectively. *See The Florida Bar v. Fussell*, 179 So.2d 852 (Fla. 1965)(decided prior to the 1969 and 1972 amendments to

the Integration Rule as found in *In re The Florida Bar*, 225 So.2d 881 (Fla. 1969), and *In re The Florida Bar*, 262 So.2d 857 (Fla. 1972), respectively). *See also The Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957).

In 1965 when *Fussell* was decided the Rule applicable to disciplinary action following *final* judgment of guilt was Rule 11.08(4). The 1969 amendment to the Integration Rule changed the Rule number from 11.08(4) to its present number of 11.07(4). Therefore, since *Fussell* dealt with the early counterpart to Rule 11.07(4), which was not activated in the instant case, Mr. Blitstein's reliance upon *Fussell* is misplaced. *See* Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida at 14. For the same reason Mr. Blitstein's reliance upon *In re Ming*, 469 F.2d 1352 (7th Cir. 1972) is also misplaced. In *Ming* the Seventh Circuit Court of Appeals was called upon to construe a rule of the United States District Court for the Northern District of Illinois dealing with disciplining attorneys convicted of misdemeanors.

General Rule 8 of the district court provided, in pertinent part:

> Rule 8. Discipline of Attorneys; Reinstatement.
>
> . . . After notice and opportunity to respond, the judges of the Executive Committee may order the disbarment or suspension of any attorney who . . . has been convicted of a misdemeanor . . . .

Ming, who had been convicted of a misdemeanor, filed an answer to the petition to suspend or disbar him, but he was not afforded a hearing prior to the suspension order being entered by the Executive Committee.

In holding that the procedure followed violated due process, the circuit court distinguished between "the difference in procedure authorized by Rule 8 between a summary disbarment or suspension for conviction of a felony, and disbarment or suspension *after notice and hearing* for professional misconduct." *Id.* at 1355 (citation and footnote omitted)(emphasis in original). The court then stated: "We do not here consider whether such summary disbarment or suspension for conviction of a felony violates due process." *Id.* at 1355 n.2. Accordingly, *Ming* did not address the issue presented in the instant case.

Without regard to any justification for procedural differences owing to the misdemeanor-felony distinction, since the Florida counterpart to the disciplinary procedure utilized in *Ming*, namely, Rule 11.07(4), was not activated in the instant case, Mr. Blitstein's reliance upon *Ming* as controlling authority is inapposite.

The suspension provisions activated in the instant case are those dealing with summary suspension based upon a trial-level determination of guilt. Rule 11.07(3) provides for summary suspension when a lawyer is convicted of a felony by a court other than a Florida state court. 32 Fla. Stat. Ann. 148 (Supp. 1978). Rule 11.07(3) further provides that the convicted lawyer may file a petition to modify or terminate the suspension

with the Florida Supreme Court, and that the court may grant modification or termination of the suspension only upon a showing of good cause. *See* Fla. Bar Integr. Rule, art. XI, Rule 11.07(2)(a), 32 Fla. Stat. Ann. 147 (Supp. 1978).

The suspension provisions of Rule 11.07(3) were activated in the instant case following the judgment of conviction entered against Mr. Blitstein in *United States v. Blitstein*, No. 78-CR-324 (D. Colo., filed Dec. 20, 1978). Mr. Blitstein petitioned the Florida Supreme Court to withhold the suspension, Appendix II, p. App. 4 *infra*, but failed to show good cause to justify the suspension being withheld. Accordingly, the Florida Supreme Court denied Mr. Blitstein's petition, and ordered that he be suspended from The Florida Bar pursuant to Rule 11.07(3). Appendix IV, p. App. 35 *infra*.

The primary purposes underlying the summary suspension provisions of Rule 11.07(3) are two-fold: firstly, to prevent the criminally convicted lawyer from victimizing his clients during the pendency of his appeal, *The Florida Bar v. Smith*, 301 So.2d 768, 772 (Fla. 1974), and secondly, to maintain the public confidence in the integrity of the Bar. *The Florida Bar v. Craig*, 238 So.2d 78, 80 (Fla. 1970). As stated by the court in *Craig*, "no single facet of disciplinary enforcement will shake the public confidence in the integrity of the Bar more than a policy which would permit a criminally convicted lawyer 'to continue to practice while apparently enjoying immunity from discipline.' " *Id.* (citation omitted).

Notwithstanding the substantial state interests served by the summary suspension provisions of Rule 11.07(3), those interests can, under certain circumstances, be outweighed by the interests of the criminally convicted lawyer. *See The Florida Bar v. Ragano*, 270 So.2d 3 (Fla. 1972), *modified*, *The Florida Bar v. Prior*, 330 So.2d 697 (Fla. 1976). However, when the Florida Supreme Court is called upon to balance those competing interests pursuant to a petition to modify or terminate suspension, it is inappropriate for the court to take into consideration the validity of the lawyer's conviction or the merits of the lawyer's appeal. *The Florida Bar v. Prior*, 330 So.2d at 699-702. (Fla. 1976).

In *Prior* the court specifically addressed the issue regarding the relevancy of a pending appeal to suspension proceedings under Rule 11.07(3), and concluded that by making trial-level determinations of guilt conclusive proof of the underlying facts, Rule 11.07 serves the legitimate purpose of

> preventing suspension proceedings in this Court from becoming factual retrial. There is neither an adequate record nor an inherent capability in this Court to pass upon the validity of the attorney's conviction or the merits of his appeal. Attempts to assess the likelihood of reversal from the arguments of counsel invite a form of speculation with which this Court should have no part. *Id.* at 699-700 (footnotes omitted).

These difficulties are further enhanced where, as here, review is sought in a state court of a pending federal court appeal. The reverse of that situation was before the court in *Will v. Immigration and Naturalization Service*, 447 F.2d 529, 533 (7th Cir. 1971), wherein the court expressed concern over federal court review of pending state court appeals:

> While arguably there may be an extremely questionable likelihood of Will prevailing in the direct appeal, nevertheless, we do not deem it our province, nor duty, to reach a decision in this respect. Aside from questions of comity, the importance of which should not be minimized, the necessity of this sort of duplicitous review of pending state court appeals would impose an unduly onerous chore on already overburdened courts. (footnote omitted).

Although in *Will* the court held that a resident alien convicted of possession of marijuana could not be deported as long as a direct appeal was pending, that holding was based upon the construction given section 241 of the Immigration and Naturalization Act, 8 U.S.C. §1251 (1970), and not upon due process grounds. *See Pino v. Landon*, 349 U.S. 901, 75 S.Ct. 576, 99 L.Ed. 1239 (1955), *reversing*, *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954)(on the grounds that Pino's conviction was not final within the contemplation of section 241 of the Immigration and Naturalization Act). Since both *Will* and *Pino* were based upon a construction of the Immigration and Naturalization Act, and not upon due process grounds, Mr. Blitstein's extensive reliance upon

those cases in support of his due process argument is wholly inappropriate. *See* Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida at 8-11.

Although questions of comity were present in *The Florida Bar v. Prior*, 330 So.2d 697 (Fla. 1976), the court was silent on the matter. However, the other difficulties enumerated by the court as being concomitant with an appellate-level *de novo* hearing on the facts underlying an attorney's felony conviction, were sufficient to justify the court's holding that a conviction is dispositive of the facts underlying that conviction. *Id.* at 699-700. After so holding, the *Prior* court then refused to stay the attorney's suspension, but it was not a *pro forma* refusal. Rather, after holding that the respondent's conviction was dispositive of the facts underlying his conviction, the court placed the interests of the public and the mitigating factors offered by the respondent in the balance, and decided that the interests of the public were weightier:

> [T]he appearance of a convicted attorney continuing to practice does more to disrupt public confidence in the legal profession than any other disciplinary problem. Members of the Bar must maintain a high standard of conduct. If the law is to be respected, the public must be able to respect the individuals who administer it. By failing to swiftly discipline an attorney found guilty of a serious offense, we necessarily impair the public's confidence in the law and in this Court's willingness to enforce the law evenhandedly.

> The immediate suspension procedure set forth in our rules is designed to remove from public counseling and from the court system as promptly as possible, but not irrevocably, individuals who stand convicted of a felony offense. *Id.* at 702.

On the basis of the foregoing it is evident that notwithstanding the conspicuous absence of any reference to the *Prior* case in Mr. Blitstein's Petition for Writ of Certiorari, *Prior* establishes the law as it stands today in Florida regarding the summary suspension provisions of Rule 11.07(3). Therefore, it is Rule 11.07(3), *as construed in Prior*, which must pass constitutional muster under the Fourteenth Amendment to the United States Constitution.

The application of the due process balancing formula enunciated in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to the procedure embodied in Rule 11.07(3), as construed in *Prior*, demonstrates both the wisdom and the constitutionality of the Florida Supreme Court's refusal to *go behind* the felony conviction of an attorney before a summary suspension is imposed.

The first factor to be considered under the *Eldridge* formula is the private interest that will be affected by the official action. Mr. Blitstein's interest is in continuing the practice of law during the pendency of his appeal. In one respect Mr. Blitstein's potential injury is greater than that of the disability benefits recipient in *Eldridge* in that no retroactive relief will be available to Mr. Blitstein if his conviction is reversed on

appeal. However, that factor alone is not controlling. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42, 89 S.Ct. 1820, 1822-23, 23 L.Ed.2d 349 (1969)(where the ability of an employee to recover erroneously garnisheed wages was speculative); *Matthews v. Eldridge*, 424 U.S. at 340 n.23, 96 S.Ct. at 905 n.23. Rather, it is also necessary to consider the degree and length of the deprivation of the affected private interest. Mr. Blitstein, as the appellant from his conviction, has a great deal of control over the duration of his summary suspension. *See The Florida Bar v. Ragano*, 270 So.2d 3 (Fla. 1972). And although some delay is inevitable owing to the very nature of the appellate process, it is by no means certain that the final decision on Mr. Blitstein's appeal will be delayed for a longer period of time than that required for a final decision on the terminated recipient's claim in *Eldridge*, where the delay between the cutoff of benefits and the final decision after a hearing exceeded one year. 424 U.S. at 342, 96 S.Ct. at 906.

Similarly, the degree of potential deprivation suffered by Mr. Blitstein is likely to be less than in *Eldridge*, and is most certainly less than in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In *Goldberg* this Court emphasized that "termination of aid [welfare assistance] pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264, 90 S.Ct. at 1018 (emphasis in original). The element of economic necessity in *Goldberg* was attenuated in *Eldridge* thereby leading this Court to conclude that:

> [T]he disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level. 424 U.S. at 342, 96 S.Ct. at 906 (citation and footnote omitted).

If the "degree of potential deprivation" factor, as discussed in *Goldberg* and *Eldridge,* is nothing more than a consideration of alternative sources of income available to an individual deprived of his primary source of income, then Mr. Blitstein's potential deprivation is much less than in either of those two cases. Mr. Blitstein suffers no physical disability which would preclude certain forms of work, nor is Mr. Blitstein dependent upon government assistance in order to subsist. Additionally, and most importantly, Mr. Blitstein is still able to utilize his professional skills to earn a living during his suspension by doing *behind-the-scene* legal work for other attorneys. The only restrictions on Mr. Blitstein during his suspension are that he may not render legal services directly to any client, and he may not appear as counsel of record in any cause. The above restrictions are the minimum required to protect clients from being victimized by an attorney who has twice displayed his tendency to do just that. *See* Appendix III, p. App. 33 *infra* (Mr. Blitstein's suspension for, *inter alia,* misappropriation of a client's funds), and Mr. Blitstein's conviction in *United States v. Blitstein,* No. 78-CR-324 (D. Colo., filed Dec. 20, 1978)(defrauding a client of $5,000.00).

In view of Mr. Blitstein's potential sources of temporary income, coupled with his control over the prosecution of his appeal, there is here, as in *Eldridge,* less reason "than in *Goldberg* to depart from the ordinary principle, established by. . . [this Court's] decisions, that something less than an evidentiary hearing is sufficient prior to adverse. . .action" affecting the private interest at stake. 424 U.S. at 343, 96 S.Ct. at 907.

The second factor in the *Eldridge* formula is the fairness and reliability of the existing procedures, and the probable value, if any, of additional procedural safeguards. At the outset it is significant to note that, unlike the affected individuals in *Goldberg* and *Eldridge,* Mr. Blitstein did have an evidentiary hearing prior to the adverse action affecting his privilege to practice law.

Mr. Blitstein had a full hearing in the criminal court under standards of proof much more demanding than the clear and convincing evidence requirement that applies in disciplinary proceedings brought by The Florida Bar. *See The Florida Bar v. Craig,* 238 So.2d 78, 80-81 (Fla. 1970)(wherein the court upheld the summary suspension provisions of Rule 11.07 against a due process challenge on the basis that the attorney's criminal trial satisfied the hearing requirement). *See also* American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement* 132 (final draft June, 1970) [hereinafter cited as Clark Committee Report]. Since proof of guilt must be more convincing in a criminal case than in a disciplinary

proceeding, it is difficult to conceive of a more fair and reliable procedure for determining an attorney's guilt than the existing one. By refusing to go behind the conviction of an attorney, the Florida Supreme Court does nothing more than assume that the criminal standard of proof, guilt beyond a reasonable doubt, has been applied fairly and reliably. For the court to do otherwise would be to engage in a speculative assessment of the circumstances surrounding the trial and the prospects of reversal on appeal. Such speculation can be embarrassing to the court at best and injurious to the public at worst. *See The Florida Bar v. Prior,* 330 So.2d 697, 700 n.11 (Fla. 1976), wherein the court stated:

> The danger of guessing the outcome of an appeal in another tribunal was illustrated when the Court was required to vacate, after an affirmance of the convictions, an opinion which had taken cognizance of the circumstances surrounding the trial, the nature of the crime, and the prospects of reversal on appeal. *The Florida Bar v. Ragano,* . . . [No. 45,'680 (Fla., filed Nov. 27, 1974), *vacated and superseded,* (Fla., filed Nov. 4, 1975)].

Apparently, even this Court refuses to engage in such speculation in applying Rule 8 of the Rules of the Supreme Court of the United States. *In re Disbarment of Mitchell,* 420 U.S. 1001, 95 S.Ct. 1442, 43 L.Ed.2d 759 (filed Mar. 31, 1975) (suspended former Attorney General John Mitchell pending an appeal, upon being furnished proof that he had been convicted of a felony); *In re Disbarment of Mardian,* 420 U.S. 1001, 95 S.Ct. 1442, 43 L.Ed.2d 759 (filed Mar. 31, 1975).

Under Rule 11.07(3) of The Florida Bar Integration Rule, a convicted attorney is entitled to show the Florida Supreme Court any facts or circumstances, other than those surrounding his conviction, which might obviate the necessity for a suspension pending appeal. Therefore, while an attorney's conviction is deemed to be conclusive proof of his guilt, it is not dispositive of the court's decision regarding suspension pending appeal. In his Petition to Withhold Suspension, Appendix II, p. App. 4 *infra,* Mr. Blitstein asserted, *inter alia:* (1) that he was unjustly convicted (App. 11-12); (2) that good cause for reversal of his conviction may exist (App. 13-18); (3) that a suspension would have severe adverse effects on both his family and his professional reputation (App. 18-19); (4) that he was not likely to victimize his clients during the pendency of his appeal (App. 23); (5) that his prior professional and social reputation was one of high esteem and respect (App. 19-23); and (6) that Rule 11.07(3) violates procedural due process (App. 23-29).

The first two assertions involved the validity of his conviction, and were not, therefore, properly before the court. *The Florida Bar v. Prior,* 330 S.2d at 699-702. Also, the fifth assertion involving prior professional and social reputation was not properly before the court, since "[p]reconviction prominence is not a balancing factor." *Id.* at 702. The remaining assertions were properly before the court, and were weighed against the interests of both the public and the profession.

It is difficult to conceive of a procedure which could more fairly and reliably afford an attorney the

opportunity to have his suspension withheld. Even a procedure which allowed oral, as opposed to written, submissions would do little, if anything, to enhance the court's decision regarding the propriety *vel non* of a suspension order.

In *Goldberg* this Court noted that in making a determination of welfare entitlement a wide variety of information may be deemed relevant, and witness credibility and veracity may be critical to that determination. Under those circumstances, written submissions were deemed "a wholly unsatisfactory basis for decision." 397 U.S. at 269, 90 S.Ct. at 1021. Additionally, written submissions were deemed to be an ineffective means for the welfare recipient to communicate his case to the decisionmaker, since most recipients lacked both the necessary writing skills and the financial resources to procure professional assistance. *Id.*

In the instant case, as in *Eldridge,* oral submissions would do little, if anything, to facilitate decisionmaking. Firstly, Mr. Blitstein, as an attorney, has been trained to communicate in writing. Secondly, the issue of witness credibility and veracity would be a minimal, if not a non-existent, factor since the need for third party testimony at a suspension hearing would be correspondingly minimal or nonexistent. Corroborating testimony is not needed to show the hardship which an attorney and his family will suffer as a result of a suspension. Similarly, the likelihood that an attorney will victimize his clients during the pendency of his appeal is a question best answered by reference to the nature of the underlying felony and the attorney's prior acts of client victimization, both of which can be

determined by documentary evidence. Thirdly, oral submissions are not necessary where, as here, an attorney interposes legal challenges to the summary suspension procedure. Of course, the suspending court may, in its sound judicial discretion, allow such oral submissions.

In view of the dangers involved in attempting to assess the likelihood that an attorney's conviction will be overturned on appeal, coupled with the adequate opportunity afforded an attorney to submit mitigating facts and circumstances to the suspending court, something less than an evidentiary hearing is sufficient to satisfy the requirements of due process. Rule 11.07(3) of The Florida Bar Integration Rule has been "tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' . . . to insure that they are given a meaningful opportunity to present their case." *Matthews v. Eldridge,* 424 U.S. at 349, 96 S.Ct. at 909 (citation omitted).

The final factor in the *Eldridge* formula to be assessed is the interest of The Florida Bar which is served by Rule 11.07(3). As stated above, p. 14 *supra,* the primary purposes underlying the summary suspension provisions of Rule 11.07(3) are to prevent the criminally convicted attorney from victimizing his clients during the pendency of his appeal, and to maintain the public confidence in the integrity of the Bar. These purposes were discussed at length in the Clark Committee Report, *supra* at 123-25. In regard to the need for immediate suspension in order to protect the convicted attorney's clients, the Clark Committee stated, at 125:

The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain.

A policy which thus jeopardizes the rights of innocent clients cannot be justified.

In regard to the need for immediate suspension in order to maintain the public's confidence in the Bar, the Clark Committee had this to say, at 123-124:

> The public is unable to comprehend why an attorney convicted of stealing funds from a client can continue to handle client funds; or why an attorney convicted of securities fraud can continue to prepare and certify registration statements; or why an attorney convicted of filing a fraudulent income tax return can continue to prepare and file income tax returns for clients; or why an attorney convicted of conspiracy to suborn perjury can continue to try cases and present witnesses; or why an attorney convicted of bribing officials of an administrative agency can continue to practice before the very agency he has corrupted; or indeed, why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice.
>
> . . . .
>
> No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline.

It is too obvious to deserve comment that if due process requires an attorney's suspension to be withheld pending the exhaustion of all available appellate remedies, as Mr. Blitstein asserts it does in his Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida at 8-14, then the twin purposes of Rule 11.07(3) will be completely frustrated. Rule 11.07(3) embodies the only feasible procedure which serves not only those twin purposes, but the interest of the convicted attorney as well.

Rule 11.07(3) also serves the legitimate interest of conserving scarce fiscal resources. Although it is difficult to estimate the additional financial cost which would attend a requirement that an evidentiary hearing be held prior to a suspension under Rule 11.07(3), the cost would not be insubstantial. Admittedly, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard . . . [but it] is a factor that must be weighed." *Matthews v. Eldridge,* 424 U.S. at 348, 96 S.Ct. at 909.

On balance, the interests of The Florida Bar and the public which are served by Rule 11.07(3) substantially outweigh the interests of Mr. Blitstein which are affected by the Rule. Rule 11.07(3) comports with the due process requirements established by the decisions of this Court, and, therefore, Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida should be denied.

II.

BY FAILING TO RAISE THE QUESTION IN THE COURT BELOW, MR. BLITSTEIN WAIVED HIS RIGHT TO ASSERT THAT THE SUMMARY SUSPENSION PROVISION OF THE FLORIDA BAR INTEGRATION RULE DENIED HIM EQUAL PROTECTION OF THE LAW.

In his Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida at 12, Mr. Blitstein states that the suspension deprived him of equal protection of the law. Mr. Blitstein makes no argument and cites no authority in support of his conclusion. Nor does Mr. Blitstein specify the manner in which the equal protection question was raised in the Florida Supreme Court, the method of raising it, and the way in which it was passed upon by that court. The lack of such specificity is not surprising since Mr. Blitstein did not raise the equal protection question in the Florida Supreme Court. *See* Mr. Blitstein's Petition to Withhold Suspension set forth in Appendix II, p. App. 4 *infra.*

It is a well established principle that failure to raise a federal question in a proper and timely manner in the state court will preclude review by this Court. *E.g., Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); *Edelman v. California,* 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Barbour v. Georgia,* 249 U.S. 454, 39 S.Ct. 316, 63 L.Ed. 704 (1919). "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair

precision and in due time." *Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928).

Since Mr. Blitstein has failed to comply with the "fair precision and in due time" requirements of this Court, his assertion that the suspension deprived him of equal proteciton of the law has been waived. Therefore, review of that assertion by this Court is precluded.

CONCLUSION

For the reasons previously set forth and on the authorities cited and argued, Mr. Blitstein's Alternative Petition for Writ of Certiorari or Prohibition to the Supreme Court of Florida should be denied.

Respectfully submitted,

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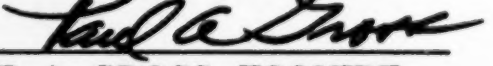
BY 

PAUL A. GROSS, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to Rules 24.1 and 33.1 of the Rules of the Supreme Court of the United States, three true and correct copies of the foregoing Brief were mailed to Melvyn Kessler, attorney for Petitioner, 1531 N.W. 15th Street Road, Miami, Florida 33125, seven true and correct copies were mailed to the Honorable Sid White, Clerk, Florida Supreme Court, Supreme Court Building, Tallahassee, Florida 32304, and one true and correct copy was mailed to the Executive Director of The Florida Bar, The Capitol, Tallahassee, Florida 32304, this 5 day of October, 1979.

Paul A. Gross

PAUL A. GROSS

Appendix

INDEX TO APPENDIX

APPENDIX I

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No state shall . . . deprive any person of life, liberty or property without due process of law . . . .

INTEGRATION RULE OF THE FLORIDA BAR

Rule 11.07: Discipline Upon Conviction

(1) *Determination or Judgment of Guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this state, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the clerk of this court and to the executive director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following

the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(a) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the executive director.

An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the 10th day following the entry of judgment of guilt, the suspension shall remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of the trial court in the criminal proceeding, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the

Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) *Suspension by judgment (other than by state court).* If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal of by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The suspension imposed on the conviction shall after final conviction, remain in effect until the convicted attorney is reinstated under the rule herein provided for reinstatement or The Florida Bar may at any time after final conviction initiate a disciplinary action against the convicted attorney if deemed advisable.

APPENDIX II

IN THE SUPREME COURT OF FLORIDA

DOCKET NO.

MARTIN BLITSTEIN,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

PETITION TO WITHHOLD SUSPENSION

The Petitioner, MARTIN BLITSTEIN, by and through his undersigned attorney, pursuant to the provisions of Rule 11.07 (3) of the Integration Rule of The Florida Bar petitions this Honorable Court to withhold and defer the suspension of the Petitioner as a member of the Bar of the State of Florida until the final disposition of the proceedings to review the judgment of guilt for a felony imposed upon the Petitioner by the United States District Court for the District of Colorado on the 19th day of December, 1978. In support of this Petition the Petitioner would show to this Honorable Court the following, all of which, it is respectfully urged, constitutes good cause to withhold and defer his suspension until he has had the opportunity to have the appellate courts of the United States, including the Supreme Court, review and consider the judgment of guilt imposed upon him.

1. On October 3rd, 1978, the Petitioner was charged in a five (5) count Indictment returned by the Federal Grand Jury for the District of Colorado at Denver, and the case became known as Case Number 78-Cr-324-1. Counts I and II of the Indictment alleged that the Petitioner, along with another who, at the time, was employed by the Petitioner as a paralegal/secretary within the District of Colorado where the Petitioner resides part time, devised a scheme to defraud one of the Petitioner's clients, one Clifford T. DeYoung by means of false representations concerning the latter's status as a potential defendant in a criminal prosecution for the unlawful and proscribed possession of cocaine, all in violation of Title 18, United States Code, Section 1343. Since Section 1343, *Code, supra,* statutorily creates a separate offense for each alleged wrongful use of the "wires" or other means of interstate commerce in furtherance of a scheme to defraud, the Petitioner was charged in (1) Count I with the use of wire communication facilities to cause a wire transfer of $5,000.00 from California to Denver, Colorado on September 14, 1978, (2) with the wrongful use of wire communications by virtue of a telephone conversation ". . . between a telephone located in Colorado and a telephone located in California . . ." on September 18, 1978. Count III of the Indictment charged the Petitioner with the illegal interstate transportation of himself on September 15, 1978 allegedly in furtherance of the scheme to defraud his own client, in violation of Title 18, United States Code, Section 2314. Count IV of the Indictment charged the Petitioner with the technical Federal Violation of the Travel Act, Title 18, United States Code, Section 1952 emanating from the same September 18, 1978 use of the wire communication facilities more fully alleged in Count II. Count V

charged the Petitioner with an additional technical Federal Violation of the Travel Act, Section 1952, *Code, supra,* by virtue of the same interstate travel effected by Petitioner on September 15, 1978. Counts IV and V each alleged that the Petitioner traveled in interstate commerce on September 15, 1978 and used interstate means of communications on September 18, 1978, respectively to perpetrate a technical and statutorily created form of extortion set forth in Title 18, United States Code, Section 875. Section 875, *Code, supra,* provides, in pertinent part:

> "Whoever, with intent to extort from any person . . . any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another . . .".

A copy of the Indictment is attached hereto and incorporated herein by reference as Petitioner's Exhibit 1.

2. Petitioner's timely presented motions for judgment of acquittal as to Counts III and IV were granted by the District Court. (See Exhibit 2, attached hereto and incorporated herein by reference.) At the conclusion of the Petitioner's trial the jury returned a verdict of acquittal as to Count I. (See Exhibit 3, attached hereto and incorporated herein by reference.)

3. The two counts on which the jury returned verdicts of guilty (Count II and V) represent, aside from the numerous errors succinctly delineated and argued in Petitioner's Motion for Judgment of Acquittal Notwithstanding the Verdict and Motion for New Trial

(Petitioner's Exhibits 6 and 7, respectively), a unique and precedential prosecution of an attorney representing a client based upon alleged representations made by the attorney to his client concerning (a) the nature and circumstances surrounding the client's detention and search by state authorities (b) explaining the likelihood of prosecution based upon the state authorities detecting and seizing cocaine possessed by the client, (c) the attorney's explanation to the client of circumstances that would surround the client's arrest should the client be prosecuted and arrested by authorities, State or Federal, and (d) fee negotiations and arrangements, both retainer and supplemental, between an attorney and his client. The prosecution of the Petitioner is also unique and precedential because neither trial defense counsel nor the undersigned counsel could find any recorded or reported prosecution of an attorney based upon the foregoing aspects and the additional facts more fully set forth below, by either the Federal authorities or the authorities of any State in the United States after resorting to the following library reference materials: Modern Federal Practice Digest, West's Federal Digest and all annotations in United States Code Annotated dealing with Title 18, United States Code, Section 875 (extortion), 1341 (mail fraud), 1343 (wire fraud), 1952 (The Travel Act); also because of the Petitioner's litigating at length, his pre-trial Motion to Dismiss based upon prosecutorial misconduct (of reprisal and vindictiveness) as well as his present intention to present the District Court's denial of such motion to the Court of Appeals as one of his Points on Appeal.

4. So unique and precedential is the Petitioner's prosecution that the following facts, adduced at his

trial, must be expanded upon herein in order to properly apprise this court of the nature and circumstances surrounding his prosecution.[1] On September 9, 1978 an actor, Clifford T. DeYoung, was detained by security officers at the Stapleton Airport, Denver, Colorado. He was detained following an x-ray examination of certain hand-held baggage which he intended to take on board the aircraft for which he was ticketed. When asked by the two security guards on the scene if he would allow them to physically and visually search his baggage, DeYoung consented. The visual and physical examination of the baggage eventually yielded a vial containing 0.097 grams of 80% strength cocaine, yielding a net quantitative amount of cocaine equal to 80 milligrams. Expert testimony adduced by the Petitioner later in the trial established that the 80 milligrams of pure cocaine could produce at least four (4) cocaine "highs."

A Denver police officer attached to the security detail at the airport, as well as one of the airport security personnel both questioned DeYoung briefly. Evidence established that DeYoung falsely responded to their inquiries when (a) he claimed to be a musician by occupation and (b) he denied any knowledge of the cocaine or its ownership. The Denver police officer did not arrest DeYoung at that time because he could not locate a field testing kit to test the then unknown substance in the vial and because without the field test results the officer could not state that the substance was, in fact, cocaine. The officer, however, advised

[1]The testimony of the only two pertinent prosecution witnesses was transcribed during the Petitioner's trial proceedings and is therefore available for inclusion with this motion. That which is available has been copied for inclusion as Exhibits with this motion. See Petitioner's Exhibits 4 and 5.

DeYoung that the substance would be submitted for laboratory analysis and, if the analysis established the substance to be cocaine, DeYoung's case would be referred to the Denver District Attorney's for prosecutive decision.

"Frightened, nervous and worried," DeYoung continued on his trip to California, where he resided, and, the next day, contacted his theatrical attorney for referral to a drug defense counsel in Colorado. The theatrical attorney, through a series of inquiries, referred the Petitioner to DeYoung, the latter contacting the former on the same day he received the advices from his theatrical attorney, September 12, 1978. When the Petitioner telephonically communicated with DeYoung on September 12, 1978 he requested the barest of the essential facts needed to appreciate DeYoung's drug-related problem and to begin inquiring into the status of the police procedures normally preceding prosecution. The Petitioner also advised DeYoung that he would recontact him. Two important facts must be remembered: first, DeYoung specifically and categorically admitted to the Petitioner that he possessed cocaine when detained at the Stapleton Airport; second, Petitioner did not request any fee or retainer or the payment of any other monies from DeYoung as of this time.

On September 13 and 14, 1978 the Petitioner telephonically communicated with DeYoung's attorney's law office and his theatrical attorney. In doing so, the Petitioner left word with personnel in the attorney's office for DeYoung to contact him, which the latter did. When doing so, DeYoung was advised by the Petitioner to wire a $5,000.00 retainer to Denver, Colorado, which DeYoung did. These particular

circumstances surrounded Count I of the Indictment on which the jury returned a verdict of acquittal. The next day, September 15, 1978 the Petitioner learned from a lieutenant in the vice and narcotics section of the Denver Police Department two important facts: that the forensic laboratory completed its analysis and report, determining that the substance in the vial was cocaine and that a warrant (for DeYoung's arrest) "would probably issue," although the Petitioner should contact the exact case agent on the matter, an Officer Costigan. Within an hour after learning this information the Petitioner telephoned DeYoung, advising him of the progress of the police progress concerning his offense and arranged an appointment to personally confer with DeYoung, at his residence later that evening. Pursuant to those arrangements the Petitioner and his paralegal/secretary traveled to California from Denver, the interstate transportation referenced in Count V of the indictment.

The evening of September 15, 1978 the Petitioner conferred, at length, with his client, DeYoung. Some of the Petitioner's remarks to DeYoung were the subject of DeYoung's testimony. (See Petitioner's Exhibit 4.) The Petitioner's testimony on the same subject matters, however, confirmed some but not all of what DeYoung described as the interaction between himself and the Petitioner both during telephone communication on but [*sic*] preceding September 15, 1978 plane trip to California and during the conference at DeYoung's residence that evening. But unlike DeYoung, the Petitioner went on to testify in explanation that DeYoung's memory was selective and omitted complete thoughts and sentences; that what the Petitioner explained to DeYoung was what could happen if prosecution were commenced, arrest procedures which

could occur if and when prosecution were commenced and how certain procedures could be followed to avoid a "public" arrest of DeYoung if prosecution were commenced, a subject with which the latter admitted to be most concerned. Moreover, the Petitioner denied stating to DeYoung or anyone else (a) that on Friday, September 15, 1978, a warrant was about to be issued for Clifford DeYoung's arrest; (b) that on Monday, September 18, 1978, a warrant was being issued for Clifford DeYoung's arrest; (c) that the defendant(s) could and would "take care" of the arrest warrant, criminal case and adverse publicity if they received a total of $25,000.00, which request was subsequently reduced to $15,000.00; (d) that the defendant(s) had associates who could in some manner remove or dispose of evidence and thus insure that a narcotics case would not be filed; (e) that a warrant had been issued for the arrest of Clifford DeYoung by authorities in Colorado; (f) that through the efforts of defendant(s) the criminal case involving Clifford DeYoung had been terminated. These were the only alleged misrepresentations listed in the Indictment.

5. The case against the Petitioner was, according to the prosecution, entirely circumstantial. This circumstantial evidence, as aforesaid, came primarily from one and, on occasion, a second witness. In critical portions, the testimony of the two prosecution witnesses conflicted with one another. (Compare Petitioner's Exhibit 4 with Exhibit 5.) The Petitioner denied any complicity to his plea of not guilty, has never waivered [*sic*] from that position, including the totality of his trial testimony in his own defense, and does not waiver [*sic*] from his position of innocence, the merits of the Petitioner's appeal and the likelihood of judgment of guilt being overturned on appeal must be measured

against the pucity [*sic*] of evidence agains[t] the Petitioner in the trial which consumed five (5) working days.

6. In the Petitioner's Motion for Judgment of Acquittal Notwithstanding the Verdict (a copy of which is attached hereto and incorporated herein by reference as Petitioner's Exhibit 6) and Petitioner's Motion for New Trial (a copy of which is attached hereto and incorporated herein by reference as Petitioner's Exhibit 7), both timely filed in the trial court, the Petitioner again called to the trial court's attention many of his claims of error throughout the trial proceedings, all of which were carefully raised and preserved during the trial, and many of which are of a Federal Constitutional dimension. The Petitioner's claims which will be briefed as error on appeal, basically attack the fundamental failures of the trial proceedings, the propriety of claiming, as an appropriate theory of prosecution, the interaction between the Petitioner and his client as violating the wire fraud Federal Statute and The Travel Act statute of the United States, the fact that the prosecution of the Petitioner on the two series was unique and unprecedented, and the quality of certain prosecutorial misconduct, especially during final argument, which irretrievably unconstitutionally tainted the trial proceedings which, concededly, were close. Although a copy of the Motion for New Trial is attached hereto, Petitioner respectfully expands upon several of the points related therein to demonstrate that his appeal if [*sic*] far from frivolous, not taken for purpose [*sic*] hindering or delaying execution of the imposed but minimal sentence of six (6) months confinement at a Federal "Treatment Center," and that good cause for a reversal of conviction may exist. That good cause for reversal may exist is represented to this Honorable Court in good faith and the Petitioner and

the undersigned counsel are confident that at least several fundamental or constitutional errors were committed during the trial proceedings which should cause the United States Court of Appeals for the Tenth Circuit or the United States Supreme Court to reverse the judgment of the lower court.

(a) The Evidence of Record was Insuffi-[*sic*] *to Prove the Offense of Travel or Transportation in Interstate Commerce With the Intent or Purpose to Carry on, Promote, Manage, Etc., an Act of Extortion as That Term is Defined by Title 18, United States Code, Section 875, All of Which is Allegedly Proscribed by Title 18, United States Code, Section 1952 (Count V of the Indictment).*

A. Title 18, United States Code, Section 1952 is aimed primarily at organized crime and especially at persons who reside in one state while operating or managing illegal *activities* located in another state. *Rewise v. United States,* 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). This section was and is enacted to punish interstate travel in aid of racketeering *enterprises* engaged in by organized crime. *United States v. Brecht,* 540 F.2d 45 (2nd Cir. 1976), *cert. denied* 97 S.Ct. 1160 (1976). When enacting this section (The Travel Act) congress did not intend a broad ranging interpretation of its language. *United States v. Peskin,* 527 F.2d 71 (7 Cir. 1971) [*sic*], *cert. denied,* 429 U.S. 818. Instead, the congress sought to prevent *racketeers* from engaging in interstate travel to further the purposes of *concerted* illegal activity. *United States v. Lightfoot,* 506 F.2d 238 (D.C. Cir. 1974). Said other wise, since the main purpose of this section is to attack organized crime, and aid local authorities in combating

organized crime, a court should not allow its provisions to be used to extend federal prosecution far from these purposes. While it rests with the court to determine the extent and parameters of Section 1952 on a case-by-case [*sic*], the legislative history clearly condemns its being directed against casual and isolated instances of illegal conduct. See *United States v. Polizzi,* ____, [*sic*] 500 F.2d 856 (9th Cir. 1974), *cert. denied* 419 U.S. 1120, especially 500 F.2d 874 and footnote number 20. Indeed, the term "business enterprise" refers to a continuous course of criminal conduct rather than sporadic casual involvement in a proscribed activity. *United States v. Donaway,* 447 F.2d 940 (9th Cir. 1971).[2]

The facts at bar do not establish a "criminal enterprise," "business enterprise," "concerted illegal activity," or "racketeering enterprise." That is to say, assuming all which the government theorizes, and assuming the evidence in light most favorable to the government, the comments expressed by this Defendant on September 15, or September 18, 1978 do not constitute the offense of extortion as proscribed by 18 U.S.C. §875 and, moreover, do not demonstrate the type of activity at which the Travel Act is directed. Accordingly, there is no jurisdictional predicate for federal interdiction of the conduct which the government alleges the defendant perpetrated in Count V.

In addition to failing to amount to an offense proscribed by 18 U.S.C. 1952, the evidence of record

[2]The committee report quoted from the testimony of the Attorney General thusly: "obviously we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." S. Rep. no. 644, 87th Cong. 1st Sess. P.3. See for example *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964).

does not support the factual basis or reasonable inference that the Defendant traveled in commerce on September 15, 1978 "with intent to promote" a proscribed unlawful activity within the parameters of 18 U.S.C. 1952. See *United States v. Vilano,* 529 F.2d 1046 (10th Cir. 1976), *cert. denied* 426 U.S. 953.

The evidence of record also fails to establish a sufficient nexus between the Defendant's travel on September 15, 1978 and the extortion alleged in Count V which the evidence of record, assumed in a light most favorable to the government, unequivocably occurred, if at all, on September 18, 1978. The federal interdiction of interstate travel requires a more intimate relationship between the interstate travel and the performance of the wrongful acts than that which has been demonstrated here. *United States v. Botticello,* 422 F.2d 832 (2nd Cir. 1970); *United States v. Hawthorne,* 356 F.2d 740 (4th Cir. 1966); cf. *United States v. Compton,* 355 F.2d 872 (6th Cir. 1966). See also *United States v. McCormick,* 442 F.2d 316 (8th Cir. 1971) (no federal crime committed when local lottery activities were prosecuted under the Travel Act on the basis of the mailings of Indiana newspapers in which the defendant advertised for salesmen to pedal lottery tickets in Indiana was minimal and incidental to the operation of the illegal lottery).

The evidence of record fails to establish venue for the Travel Act violation alleged in Count V to be the District of Colorado, in contravention of the principal [*sic*] established in *Spinelli v. United States,* 382 F.2d 871 (8th Cir. 1967), *reversed on other grounds,* 393 U.S. 410. In *Spinelli,* the defendant was charged with interstate travel in aid of racketeering enterprise and a

substantive violation of the underlying criminal statute which took place when the defendant crossed into the State of Missouri with the intent to commit the illegal act *in Missouri.* In *Spinelli* the defendant was tried in the District Court of Missouri, not the District Court from which commenced his travel. Accordingly, the appropriate venue for a Travel Act violation as that alleged in Count V based on the facts adduced at trial, assuming without conceding their sufficiency, venue for the Count V offense would be the United States District Court for the Middle District of California.

Moreover, the evidence of record establishes no more than a dialog between an attorney and his client, misconstrued and quoted out of context by the client during the trial testimony. The attorney did not ask for a retainer toward the fees to be paid until after he had deduced that the cocaine had been analyzed in the police forensic laboratory. Thereafter, and following the personal conference with the client, the attorney requested an additional $20,000.00 in fees to represent DeYoung on what the attorney believed to be an impending prosecution for possession of cocaine. He received no more than an additional $10,000.00 in checks which turned out to be drawn on an account with insufficient funds and then the subject of "stop payment" orders by the client. The client, who admitted to being "worried, frightened and nervous" since the time of his detention and the search of his baggage, and the client's subsequent attorney, never requested or demanded a refund of any of the monies paid to the Petitioner. To pyramid DeYoung's selective quotations and memory and practice of uttering "halfphases" on to the normal practice of attorneys doing criminal defense work to demand and obtain reasonable fees "up front"

or in advance of the work to be done into the category of alleged fraud or extortion, however technical those concepts may be in 18 U.S.C. Sections 1343 and 875, respectively is to carry out unreasonable and unfounded inference building on a factually weak foundation. Such a practice, often condemned in appellate decisions, is exactly what occurred in this prosecution, violating the Petitioner's rights to fundamental fairness and due process of law and in contravention of the Petitioner's rights against selective prosecution.

> *(b) The Prosecutor's Argument ". . .That the Defendant Sat Back And Waited and Did Not Testify Until all of the Evidence Was In. . ." And His Announcement That ". . .There has been Perjury Committed in This Trial" Singularly and In Tandum Constituted Reversibly [sic] Prejudicial Improprieties Which Should Have Been the Subject of the Court's Instructions to Disregard and the Granting of the Petitioner's Motions for Mistrial.*

The prosecutor's argument, coming at the end of a bitterly contested trial in which the credibility of the Petitioner was pitted against that of DeYoung and, occasionally, that of his cousin, Davis, was inflammatory and reasonably calculated to arouse prejudice against the Petitioner. It also constituted personal opinions of the attorney and included comments of alleged "facts" beyond the record of these proceedings. By more than innuendo, the prosecutor accused the Petitioner of perjury, a fact neither admitted nor proven at trial. The argument, uninvited by Petitioner's argument, constituted reversible error which should have been the subject of the court's

instructions to disregard an order granting the Defendant's motions for mistrial. *United States v. Ludwig,* 508 F.2d 140 (10th Cir. 1974); *United States v. Latimer,* 511 F.2d 498 (10th Cir. 1975); *United States v. Peak,* 498 F.2d 1337, 1339 (6th Cir. 1974); *Reichert v. United States,* 359 F.2d 278, 281-282 (D.C. Cir. 1966); *Marks v. United States,* 260 F.2d 377, 383 (10th Cir. 1958); *cert. denied* 358 U.S. 929; *United States v. Perez,* 493 F.2d 1339, (10th Cir. 1974).

As to the prosecutor's assertion of personal knowledge and belief and the injection of such personal knowledge and belief on the "scales of credibility," see *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629; *United States v. Bettenhausen,* 499 F.2d 1223, 1233 (10th Cir. 1974); *United States v. Martinez,* 487 F.2d 973, 977 (10th Cir. 1973).

6[*sic*]. The Petitioner and his family have suffered greatly from the time he surrendered into Federal pre-trial custody, on or about October 10, 1978, throughout the trial attended by substantial publicity, and to this time. They will, of course, suffer greatly in years to come, whatever the ultimate outcome of future proceedings. The Petitioner is 38 years old, has been married for 13 years and has an infant son, seven years of age. His livelihood is derived from his private practice of law, which began in 1974, several years before his admission to the bar. The Petitioner has specialized in trial litigation, especially criminal defense work.

The news coverage of the petitioner's indictment and trial has affected his practice and subjected him

and his family to severe adverse publicity. The Petitioner's reputation amongst the public-at-large and those who do not know him personally has suffered—his ability to earn has suffered with it. If his present application for a deferment of suspension from the practice of law is not acted on favorably, the Petitioner will suffer an additional unseasonal stigma as well as the deprivation of means of support.

7. The Petitioner's professional and social reputation has been one of high esteem and respect. (See Petitioner's Exhibits 13 through 17). The recognition by others of the Petitioner's talents, legal abilities, especially his strong understanding of the law, and his compassion for the clients he represents is noteworthy. Mr. John G. McKay, Jr., a partner in the prestigious lawfirm of Bradford, Williams, McKay, Kimbrell, Hamann and Jennings states in pertinent part:

> "I have known and worked with Mr. Martin Blitstein over the last few years . . . .
>
> "I have been pleased and impressed with Martin's legal abilities. His relationship with me has been one of a friend showing not only legal acumen but concern and compassion for those clients he represents.
>
> * * *
>
> "As a lawyer, he has shown strong understanding of the law. As a person, he has understood the needs of clients. As a friend he

has gone beyond what is normally expected of one who desires to help those in destress [*sic*] who cannot help themselves.

"I do not believe that the punitive action of suspension at this time is justified."

(Petitioner's Exhibit 13). Mr. Andrew D. Hall, a friend and professional acquaintance of the Petitioner for over twenty years writes,

"Subsequent to Mr. Blitstein's graduation from the University of Miami College of Law, I have had occassion to work with him on various professional matters. I have found him to be a lawyer who is diligent in his representation of his clients and advocates their position ably. On a personal basis, I have found Mr. Blitstein to be sensitive, thoughtful and honorable, being concerned about his family, friends and most particularly, the needs and problems of his clients.

"By reason of my familiarity with Mr. Blitstein over these years, I believe that Mr. Blitstein should be permitted to continue in the practice of law and should not be subjected to penalty by suspension or disbarment pending appellate review of his conviction in the United States District Court For the District of Colorado."

(Petitioner's Exhibit 14). Mr. Leslie Libman, an acquaintance of the Petitioner for over 13 years describes him thusly,

"Martin Blitstein was and is a serious, diligent and dedicated student of the law. He has exhibited brilliance, talent and and tenacity in his studies as well as thereafter in private practice. He is a zealous defender of the legal system and the rights of his clients within it.***

". . . Mr. Blitstein has never demonstrated a lack of these qualities. To the contrary, I believe that he is a man who would and has made great personal sacrifices for the sake of rights of a client as he perceived them.

"On a personal level, I know Mr. Blitstein to be a sensitive, thoughtful, honorable person lovingly concerned about his family and friends, and responsive to the needs and problems of his clients. I am certain, as a result of my past close association with him, that his actions under no circumstances could be motivated by malice or illintention.

"I would expect that time and reflection will dispell any question, if indeed any exists, about his integrity and moral correctiveness, and that any situation or circumstances presently existing which lends an appearance contrary will be resolved in his favor as a result of the

careful inquiry and review. I hope every opportunity for the same will be afforded him."

(Petitioner's Exhibit 15). Mr. Peter Blitstein, a professional architect and one of the Petitioner's brothers writes, in pertinent part:

"As a professional myself, I have done work for Marty many times. I have always found him honest and concerned, treating people with the utmost of respect. His energy may be misinterpreted, but his professional integrity is always in the right place.

"It is with great love and concern for him, both as a brother and a friend, that I write this letter. He has always shown great impartiality to all clients in his endeavor to give them fair representation. He has helped a great many people in their time of personal difficulty (including myself), often times neglecting his own well-being. I only hope that now the same can be shown to him so that he will be able to return to his practice of law which has always been his great passion."

(Petitioner's Exhibit 16). And J. Frederic Blitstein, Ph.D, an environmentalist and second brother of the Petitioner writes,

". . . its inconceivable to me, knowing my brother as I do, that his zealousness in representing clients could or should result in

such harsh, punitive action such as a suspension. There are so many people in the city who have been helped by Marty, including all of us who are his family. We hold him in the highest esteem as a loved one, as an extremely talented lawyer and as a good and decent person."

(Petitioner's Exhibit 17).

8. The Petitioner respectfully asserts that he is not of such callous and insensitive nature as to be a bad risk during the pendency of his appeal; neither would he be likely to victimize his clients, nor, as is demonstrated by the exhibits attached be viewed by fellow members of the Bar and the public as a pariah or a detriment to the legal profession. See the *Florida Bar v. Smith,* 301 So.2d 768 (Fla. 1974); *The Florida Bar v. Ragano,* 270 So.3 [*sic*] (Fla. 1972). Moreover, the record reflects that the Petitioner did not profit from the conduct which was the subject matter of the charges against him and does not demonstrate that he acted, if at all, as described by the prosecution witness with a corrupt motive. Accordingly, suspension, even pending appeal, would be too extreme, excessive and harsh a penalty to impose upon the Petitioner. *In re: Inquiry Concerning Judge Hal D. Dekle,* Fla. Supreme Court Case No. 46,600 (Fla. 1975); *The Florida Bar v. Thomson,* 271 So.2d 758, 761 (Fla. 1973).

9. The Rule calling the suspension of the Petitioner, pending an appeal from a conviction, which conviction is the sole predicate for the punitive action of suspension, is unconstitutional, both on its face and as

applied to the facts at bar and the Petitioner. It is unconstitutional because the right to practice law is subject to the protections of procedural due process and may not be suspended or destroyed without a hearing determining with finality the *underlying facts* constituting the alleged misconduct. At the very least, therefore, disbarment cannot result by reason of a conviction unless and until that conviction is rendered "final" within the meaning of procedural due process. Procedural due process requires appropriate appellate review before a conviction is "final."

A license to practice law is in the nature of a property right, pursuant to which an attorney is able to earn a living. It cannot be suspended or destroyed without procedural due process. It makes no difference whether a law license is characterized as a "right" or as a "privilege" since United States Supreme Court decisions have rejected the contention that the availability of due process protection turns upon any such characterization. *Graham v. Richardson,* 403 U.S. 365, 374 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970). *Board of Regents v. Ross,* 408 U.S. 564 (1972) and case authorities cited therein. Indeed, in *Willner v. Committee on Character,* 373 U.S. 961 (1963), the Supreme Court specifically said,

> "Moreover, the requirements of procedural due process must be met before a State can exclude a person from practicing law."

Procedural due process requires adequate notice and a hearing. *Sherbert v. Verner,* 374 U.S. 398 (1963) (disqualification for unemployment compensation);

Slochower v. Board of Education, 350 U.S. 551 (1956) (discharge from public employment); *Speiser v. Randall,* 357 U.S. 513 (1958) (denial of tax exemption); *Goldberg v. Kelly, supra,* (withdrawal of welfare benefits); *Bell v. Burson,* 402 U.S. 535 (1971) (suspenson of driver's license); *Wisconsin v. Constangineau* [*sic*], 400 U.S. 433 (1971) ("posting" an individual to prohibit sale of alcoholic beverages to him); *Connell v. Higginbatham,* 403 U.S. 207 (1971) (discharge from public employement [*sic*]). It follows that no person, including a practicing attorney, can constitutionally be suspended from such practice or disbarred in the absence of a hearing sufficient to meet the requirements of procedural due process. Documentary proof of a non-final conviction, without more, is constitutionally insufficient to satisfy procedural due process requirements. *Joyner v. State* 30 So.2d 304 (Fla. 1947) (a previous conviction may not be employed to enhance punishment in a subsequent case unless such conviction is final and if an appeal has been taken from a judgment of guilty in a trial court that conviction does not become final until the judgement [*sic*] of the lower court has been affirmed by the appellate court).

Logic and essential fairness also dictates the same conclusion. Since a conviction obtained in contravention of law is, in fact, a nullity and since convictions often are reversed and nullified because of unfairness and other error, suspension prior to the completion of appellate review, based solely upon a jury's verdict and the imposition of sentence, is unfair and unconstitutional.

The Petitioner's position was and is supported by decisions of the United States Supreme Court and other, lower federal courts. *Pino v. Landon,* 349 U.S. 901 (1955); *In Re: Sawyer,* 360 U.S. 636, 639, 79 S.Ct. 1376 (1957); *In Re: Ming,* 469 F.2d 1352 (7th Cir 1972); *Will v. Immigration and Naturalization Service,* 444 F.2d 529 (7th Cir. 1971).

In *Pino v. Landon, supra,* the Supreme Court vacated a deportation order entered by the Court of Appeals for the First Circuit on the ground that it was not consistent with due process to order the deportation of an alien because of a criminal conviction which has not "attained such finality" as to support such an order. (The facts of *Pino* set [*sic*] forth in *Pino v. Nicholls* [*sic*], 215 F.2d 237 (1st Cir. 1954). Pino, an alien, had been convicted of petty larceny. Twice he withdrew his appeal and, seemingly, therefore waived his right to test the legality of his conviction by appellate review. His original jail sentence, however, thereafter had been suspended and a period of probation imposed. At the conclusion of the probation period his case was placed in what was called an "on-file status". 215 F.2d at 242. The First Circuit determined that this on-file status" [*sic*[provided the Massachusetts district court with the power to indefinitely postpone a determination as to whether the ends of justice required the imposition of a prison sentence. The First Circuit determined, therefore, that, in theory, Pino's case could later be taken from the file and the subject of a prison sentence. Pino asserted that he would be entitled to appeal from any sentence in the event his case was taken from the "on-file status" and that therefore his case and its conviction lacked a "finality" as to whether he had, in fact, been "convicted." 215 F.2d 242.

Based upon these unusual facts the First Circuit agreed that ordinarily a *verdict* of guilty was insufficient for an order of deportation unless and until the guilty verdict was affirmed upon appropriate appellate review. The court said 215 F.2d 244 [*sic*]:

> "The government contends that upon a plea of not guilty, the statutory requirement of being 'convicted' is satisfied, without more, when a verdict of guilty is returned by the jury, or a finding of guilty is made by the court, as the case may be. We are not prepared to assent to this proposition. A verdict or finding of guilty is usually followed by a motion for a new trial which, as we know, and as was so in Pino's petty larceny case, frequently results in the award of a new trial. So, too, appeals from conviction in the trial court often result in the award of a new trial. Judicial action on the motion for a new trial made immediately after verdict or finding of guilty, and judicial action in the normal routine appellate review provided by law, part of the ordinary processes of reexamination, the outcome of which perhaps ought to be awaited before it can be said, with sufficient certainty and definitness [*sic*], that the State has 'convicted' the alien of crime."

Despite this analysis, the First District ordered the deportation of Pino, mostly because of the unusual circumstances in that case, which included a lengthy delay and voluntary waiver at one time of the right to appellate review of the conviction in question. The Supreme Court, however, reversed, noting the non-finality of the conviction.

If the "conviction" in *Pino* was not sufficiently "final" for purposes of subjecting Pino to deportation, then the Petitioner's conviction is certainly not sufficiently "final" for purposes of suspension where the conviction was suffered on December 19, 1978 and where, ordinarily, appropriate appellate procedures are already in process and are anticipated to be protracted. Indeed, the right to practice law cannot, as a matter of procedural due process, be taken away on the basis of the petit jury verdict of guilty alone, when such a verdict was determined by the Supreme Court in *Pino* be [*sic*] constitutionally insufficient to sustain the deportation of an alien.

This precise point was considered in *In Re Ming, supra.* There the United States Attorney filed a Petition before the executive committee of the District Court seeking Ming's suspension or disbarment *pending* his appeal from a misdemeanor conviction. The application was based upon a local Rule which provided that the Executive Committee could disbar an attorney who had been convicted of a misdemeanor or committed other acts of misconduct. The District Court entered an order of disbarment.

The Seventh Circuit reversed the order of disbarment, urging that " . . . the suspension for 'conviction' of a misdemeanor took place before the conviction had reached finality." 469 F.2d at 1353. In doing so the court also said at page 1354:

> "In looking at the panoply of individual rights, we do not find a basis for awarding a citizen lawyer a lesser position than the alien."

The Seventh Circuit's decision relied in part upon *Will v. Immigration and Naturalization Service, supra,* another case in which the deportation of the an alien had been stayed pending appeal from a conviction when the conviction, standing alone, was the sole basis for the deportation sought.[3]

WHEREFORE,

(1) In light of the fact that good cause may exist for a reversaal [*sic*] of the judgment of conviction, or at least that the possibility of reversal should not be rejected out of hand;

(2) In light of the fact that to deprive the Petitioner of his license to practice law would have such severe and drastic consequences to him and his family;

(3) In light of the fact that these severe and drastic consequences should only be invoked when the court is satisfied that the sole predicate for the punitive action of suspension, the conviction, has attained a substantial degree of "finality" within the meaning of due process of law (see case authorities *op. cit.* this numbered paragraph of the petition);

[3]The Seventh Circuit went on to conclude that Ming's conviction would not be "final" within the meaning of due process of law so long as writ of certiorari to the United States Supreme Court could be filed, and that Ming would not loose [*sic*] his license to practice law absent a *full evidentiary hearing* before the applicable tribunal. See also *Reich, The New Property,* 73 Yale L.J. 733 (1964).

(4) In light of the fact that the conviction itself and not the alleged constituent conduct thereof is the sole basis for the suspension, contemplated by the Rule and urging of The Florida Bar; and

(5) In light of the fact that the Petitioner's character is such, and the offense alleged is of such a nature, that it would not be inconsistent with the public interest to permit him to continue to practice his profession during the pendency of his appeal;

the Petitioner respectfully prays this Court enter its order granting this Petition and deferring and withholding any suspension from the practice of law during the pendency of his appeal of his conviction.

Respectfully submitted,

MELVYN KESSLER, Esquire
Attorney for Petitioner
1531 N.W. 15 Street Road
Miami, Florida 33125
305-324-4104

BY_____
MELVYN KESSLER

STATE OF FLORIDA

County of DADE

Before me, the undersigned authority personally appeared MELVYN KESSLER, Attorney for the Petitioner herein, who, by me first having been duly sworn, deposes and says that he the attorney for the Petitioner, that he has read the foregoing facts contained in the Petition to Withhold Suspension and that the same are true and correct to the best of his knowledge and belief.

_____
Melvyn Kessler, Esquire

Sworn to and subscribed before me this 19th day of January, 1979.

_____
Notary Public My
MY commission expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition to Withhold Suspension with Exhibits 1 through 17 were mailed to the Executive Director of The Florida Bar, The Florida Bar, Supreme Court Building, Tallahassee, Florida 32304, this day of January, 1979.

MELVYN KESSLER

APPENDIX III

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

TUESDAY, MARCH 26, 1974

THE FLORIDA BAR,

Complainant,

vs.

MARTIN BLITSTEIN,

Respondent.

CASE NO. 45,219

Complainant's petition for approval of conditional guilty plea and entry of final order of discipline is hereby granted and the following disciplinary measures are hereby approved by the Court:

1. Suspension from the practice of law for forty-five (45) days following entry of the Supreme Court's order of discipline. Such suspension shall commence upon Respondent's receiving notice of the Supreme Court's mandate.

2. Costs incurred in these proceedings shall be taxed against the Respondent and payed to The Florida Bar within thirty (30) days after entry of the order of discipline unless such time is extended by The Florida

Bar for good cause. Such costs shall include $434.20 assessed in the grievance committee report and in addition $50.00 in administrative costs at the referee level in addition to any other costs payed by The Florida Bar in this proceeding.

ADKINS, C.J., ROBERTS, ERVIN, BOYD, McCAIN and DEKLE, JJ., concur
A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

sg

cc: Honorable Norman A. Faulkner
Honorable Hugh Wood
Honorable Michael H. Bloom
Honorable Martin Blitstein

APPENDIX IV

IN THE SUPREME COURT OF FLORIDA

FRIDAY, FEBRUARY 23, 1979

CASE NO. 55,984

THE FLORIDA BAR,
Complainant,

vs.

MARTIN BLITSTEIN,
Respondent.

The Florida Bar having filed on January 15, 1979, letter treated as Petition to Suspend showing that Martin Blitstein had been convicted of a felony in a court other than a court of the State of Florida and having accompanied said notice by proper proof of service, and the above-named attorney having filed a Petition to Withhold Suspension with the Court requesting modification or termination of the suspension, it is hereby ordered that the Petition to Withhold Suspension is denied, and Martin Blitstein is suspended from The Florida Bar pursuant to article XI, Rule 11.07(3) of the Integration Rule of The Florida Bar; and it is further

ORDERED that his suspension shall be effective March 26, 1979, thereby giving Respondent thirty (30) days to close out his practice and take the necessary steps to protect his clients; and it is further

ORDERED that Respondent shall not accept any new business.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

TC
cc: Scott K. Tozian, Esquire
Melvyn Kessler, Esquire
Martin Blitstein, Esquire

A True Copy
TEST: Sid J. White
Clerk Supreme Court